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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

AMERICAN SAFETY CASUALTY INSURANCE COMPANY, Plaintiff and Respondent, v. JOHN MOTHERSHEAD et al., Defendants and Appellants; SALVADOR REYNOSO, Intervener and Respondent.	2d Civil No. B206494 (Super. Ct. No. CIV214427) (Ventura County)

Respondent Salvador Reynoso was injured while acting in the course and scope of his employment for Matilija Gardens nursery, on property owned by appellants John Mothershead and Terease Mothershead. Respondent American Safety Casualty Insurance Company (American Safety) filed an action to recover workers' compensation benefits it had paid to Reynoso. Reynoso intervened in the action, alleging that appellants were liable for his injuries. Prior to trial, appellants served Code of Civil

Procedure section 998[1] offers to compromise on both Reynoso and American Safety. Neither offer was accepted. A jury found that appellants were not negligent.

Appellants filed a memorandum of costs totaling $100,526.27, which included $47,402.62 they had paid in expert witness fees. Reynoso filed a motion to tax appellants' costs. The trial court disallowed appellants' expert witness fees on the ground that their section 998 offers to settle the case were conditional and ambiguous. The sole issue on appeal is the validity of appellants' offers to compromise made to Reynoso and American Safety. We conclude the trial court did not abuse its discretion in ruling that the offers were invalid and affirm.

FACTS and PROCEDURAL HISTORY

Salvador Reynoso was employed by Matilija Gardens nursery, whose workers' compensation carrier was American Safety. On September 21, 2001, Reynoso was injured on appellants' property while acting in the course and scope of his employment. Reynoso, along with employees of R. Davis Construction, had attempted to remove a palm tree from a truck bed using a backhoe. The tree fell onto Reynoso, causing injuries which included a fractured spine and arm.

American Safety filed a complaint against R. Davis Construction and Dan Lemp for recovery of workers' compensation benefits it had paid to Reynoso. (§ 387; Lab. Code, § 3852 et seq.) Reynoso filed a complaint in intervention, alleging negligence by R. Davis Construction and others, requesting in excess of $750,000 in general damages, compensation for current and future medical expenses, lost wages and future lost income.

Appellants attempted to settle with Reynoso and American Safety. On February 11, 2005, appellants served a section 998 offer (hereafter 998 offer) upon American Safety in exchange for a waiver of costs. On September 8, 2006, appellants served a 998 offer of $50,000 upon Reynoso. Neither offer was accepted.

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1 All statutory references are to the Code of Civil Procedure unless otherwise stated.

The matter proceeded to trial and the jury returned a special verdict, finding that R. Davis Construction and Dan Lemp were 60 percent responsible for Reynoso's injuries; Reynoso was 40 percent responsible; and appellants and Reynoso's employer were not negligent. The jury found Reynoso's damages to be $522,000 and American Safety's damages to be $260,000.

The court entered a judgment entitling Reynoso and American Safety to judgment, jointly and severally, against R. Davis Construction and Dan Lemp in the amount of $313,200. Judgment was entered in favor of appellants and against American Safety, Reynoso, R. Davis Construction and Dan Lemp.

The court held a post-judgment hearing regarding distribution of the judgment, which included a motion filed by Reynoso to tax appellants' costs. The trial court ruled that appellants' expert witness fees were not recoverable. This appeal followed. R. Davis Construction, Inc. and Dan Lemp are not parties to the appeal.

Hearing on Motion to Tax Costs

Appellants filed a memorandum of costs totaling $100,526.27, which included $47,402.62 in expert witness fees. Reynoso moved to tax appellants' costs, asserting that the expert witness fees were not recoverable because appellants' pre-trial offers were invalid under section 998.

Reynoso argued that the 998 offer served upon him was conditioned upon acceptance by American Safety and was thus invalid. He could not accept it unless American Safety agreed to satisfaction of the workers' compensation lien. Reynoso also claimed the terms of the offer were so vague that it could not be properly evaluated.

At a hearing on October 10, 2007, the trial court found that the condition set forth in appellants' 998 offer to Reynoso required a "general release of all liability" referenced in the complaint, making acceptance impossible without American Safety's approval.[2] It also found that reference to the "complaint" in the latter part of the offer

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[2] The offer was served September 8, 2006 and read, "To Plaintiff-in-Intervention Salvador Reynoso and his attorneys of record: [¶] Defendants/Cross-Complainants/Cross-Defendants Terease Mothershead and John Mothershead jointly

should have instead read, "'complaint-in-intervention.'" Moreover, the offers to both Reynoso and American Safety included a general reference to "'liens and encumbrances.'" The court concluded this language was vague and therefore did not constitute a valid 998 offer to compromise.[3] Appellants' expert witness fees in the amount of $47,402.62 were disallowed.

DISCUSSION

Section 998, subdivision (b), provides in pertinent part, that up until 10 days before trial "any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time." An offer not accepted prior to trial or within 30 days is deemed withdrawn. (*Id.*, subd. (b)(2).) A plaintiff who fails to accept an offer and then fails to obtain a more favorable result at trial cannot recover his postoffer costs and must pay the defendant's costs from the time of the offer, including expert witness fees. (*Id.*, subd. (c)(1).) "[T]he court . . . in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular

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offer to compromise in the above-entitled action filed by Plaintiff-in-Intervention Salvador Reynoso, pursuant to Section 998 of the California Code of Civil Procedure for the sum of $50,000.00, each party to bear its own costs and attorney's fees and Salvador Reynoso and/or his attorneys of record *to satisfy any liens, including, but not limited to worker's compensation liens or claims or encumbrances which do or might exist.* In further consideration of said sum, and as an essential condition of this offer, Intervenor shall execute and file with the court a Request for Dismissal, with prejudice, of the *complaint-in-intervention* herein as to said Defendants, or of the entire action, and shall execute and return to counsel for said Defendants *a general release of all liability* for the incident referenced in the *complaint* on file herein. [¶] Said offer shall be deemed withdrawn if not accepted within thirty (30) days after service thereof or prior to trial, whichever occurs first." (Italics added.) Appellants had previously served a $35,000 offer to compromise upon Reynoso.

[3] The offer was served February 11, 2005 and read, "To Plaintiff, American Safety Casualty Insurance Company and its attorneys of record: [¶] Defendants/Cross-Complainants/Cross-Defendants Terease Mothershead and John Mothershead offer to compromise in the above-entitled action filed by Plaintiff, American Safety Casualty Insurance Company, pursuant to Section 998 of the California Code of Civil Procedure, in exchange for a waiver of costs. Further, as part of this settlement, Plaintiff and/or its attorneys of record shall satisfy *any liens or encumbrances which might exist*; plaintiff shall execute a Request for Dismissal, with prejudice, of the complaint herein as to said defendants, or of its entire action and shall execute a Release. [¶] Said offer shall be deemed withdrawn if not accepted within thirty (30) days after service thereof or prior to trial, whichever occurs first." (Italics added.)

employees of any party, actually incurred and reasonably necessary" in preparation or during trial, or both. (*Ibid.*)

An award of expert fees is reviewed for abuse of discretion. (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262.) The enforceability of a section 998 offer is an issue of law we review de novo. (*Elite Show Services, Inc. v. Staffpro, Inc.* (2004) 119 Cal.App.4th 263, 268; *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 797.) The offeror bears the burden of proving the offer was valid under section 998. (*Peterson v. John Crane, Inc.*, (2007) 154 Cal.App.4th 498, 505.)

Validity of 998 Offers

Section 998 is intended to encourage settlement by punishing the party who fails to accept a reasonable offer. (*Elite Show Services, Inc. v. Staffpro, Inc*., *supra*, 119 Cal.App.4th at p. 268.) A statutory pretrial settlement offer must be sufficiently specific to permit the recipient to meaningfully evaluate it. (*Thomas v. Duggins Const. Co., Inc.* (2006) 139 Cal.App.4th 1105, 1114.) An offer made to two or more parties is invalid where it is conditioned upon acceptance by all parties. (*Wickware v. Tanner* (1997) 53 Cal.App.4th 570, 576.) The offer is effective to shift liability for costs only where the offer was properly allocated to multiple offerees and "was made in a manner allowing the individual offerees to accept or reject it." (*Menees v. Andrews* (2004) 122 Cal.App.4th 1540, 1544.) An offer that is not clearly apportioned among offerees is fundamentally unfair to the individual who wants to accept it. (*Ibid.*)

Appellants' 998 offer to Reynoso was conditional because it required American Safety to agree to satisfaction of the workers' compensation lien for Reynoso's acceptance. The offer was effectively directed to two separate litigants with two separate theories of recovery. The trial court further found that the language of the offer was inconsistent. It required Reynoso to file a request for dismissal of the complaint-in-intervention and execute a general release of liability "for the incident referenced in the complaint . . . ." Appellants, as the proponents of the offer, bore the burden of drafting it with specificity. It was inconsistent to require Reynoso to dismiss the "complaint-in-intervention" and, in the same sentence, make reference to the "complaint."

The trial court also found that both 998 offers were too vague to be evaluated. The terms of the appellants' offer to Reynoso required him "to satisfy any liens, including, but not limited to workers' compensation liens or claims or encumbrances which do or might exist." American Safety was required "to satisfy any liens or encumbrances which might exist." Neither offer specified the amount or type of the lien. Neither was sufficiently certain to be capable of evaluation. The offers did not trigger the cost-shifting provisions of section 998.

DISPOSITION

Reynoso's and American Safety's rejection of the 998 offers did not render them liable for appellants' expert witness fees as costs. The trial court did not abuse its discretion in denying appellants' request for expert fees.

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Frederick Bysshe, Judge

Superior Court County of Ventura

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